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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/758,978	01/12/2001	Brian A. Torok	149801.15001	2490

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EXAMINER

NASSER, ROBERT L

ART UNIT	PAPER NUMBER
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3736

DATE MAILED: 03/09/2004

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 20

Application Number: 09/758,978

Filing Date: January 12, 2001

Appellant(s): TOROK ET AL.

Thomas Moga
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed March 5, 2004.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Invention

The summary of invention contained in the brief is deficient because the summary does not refer to the specification by page and line number and the drawings by reference numeral. New summary (provided by appellant):

The present application discloses and claims an article for the identification of the premature rupture of a membrane during pregnancy. The invention is portrayed in several embodiments. (Application as filed, page 4, line 10, through page 4, line 6, and Figures 1 through 13 as filed) The embodiment of the claims being appealed is directed to the use of a non-irritating, pH-sensitive material that is applied to an indicating article in the form of a pad that is fitted to the undergarment of a wearer. (Application as filed, page 4, lines 7 - 9; page 5, lines 31 - 33; page 9, lines 1 - 18 [includes non-irritating pH indicating material]; page 10, lines 14 - 16; page 11, lines 38 - 39; page 12, lines 1 - 4; and Figure 6 as filed.) The pH-sensitive material applied to the pad responds by way of a visualizable color change to the presence of amniotic fluid as a discharge. (Application as filed, page 4, lines 29 - 30; page 5, lines 10 - 12; page 8, lines 31 - 39; page 9, lines 1 - 18; page 9, 42 - 43; page 10, lines 1 - 11; and page 12, lines 5 - 38.)

(6) Issues

The appellant's statement of the issues in the brief is correct.

(7) Grouping of Claims

The appellant has stated that all pending claims stand or fall together.

(8) *Claims Appealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

JP 5-123324

Yazaki

5-1993

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

The examiner notes that the double patenting rejection has been withdrawn.

Claims 2-5, 7-11, 13-16 and 31-34 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Yazaki JP 5-123324. Yazaki shows a pad wearable "substantially adjacent the crotch" of a women that has a color indicator that changes color in the presence of amniotic fluid and teaches the method for detecting rupture of the amniotic membrane, including premature rupture by wearing the pad, and looking at the pad for a period of time to detect a color change of the indicator.

(11) *Response to Argument*

The double patenting rejection has been withdrawn and therefore the arguments with respect thereto are moot.

Before addressing the arguments as to the art rejection, the following procedural issue needs to be addressed. The examiner notes that appellant has submitted evidence with the appeal brief attempting to establish that bromothymol blue, the chemical indicator used in Yazaki, is a known skin irritant. The examiner notes that the evidence is not being entered into the case in that, in accordance with MPEP 1207 and

37 CFR 1.195, there is no showing of good and sufficient reason why the evidence was not previously submitted. Accordingly, the evidence is not part of the record on appeal and the record on appeal is therefore devoid of any evidence establishing that bromothymol blue is a skin irritant.

The examiner further notes that if appellant were successful in establishing that bromothymol blue is a known skin irritant, the claims would still be subject to a rejection under 35 U.S.C. 103 as being obvious over Yazaki in view of US Patent 5,660,790 to Lawrence (not of record), for example, as Lawrence teaches the equivalence of bromothymol blue and several other chemical pH indicators that change color with the pH levels, so of which are the same as those used by applicant, and accordingly, are non-irritating.

Appellant has asserted that Yazaki does not show "that which is claimed." The examiner notes that appellant has not referred to a specific claim limitation not present in Yazaki. More specifically, appellant has asserted on page 9, lines 9-10 of the brief, that the indicator sheet 6 of Yazaki cannot be brought into contact with the skin of the user. It is the examiner's position that the claims do not require that the indicator sheet be brought into contact with the skin. The limitation requiring contact with the skin was introduced the after final amendment and was not entered. Rather, the claims 1, 7, and 13 only require that an article is worn substantially adjacent the crotch and claim 31 only requires that the article is applied to a surface suspected to have amniotic fluid. Both limitations are met by the pad of Yazaki.


Appellant has further asserted that one skilled in the art would not conclude that there is no difference between the claimed invention and Yazaki. As pointed out above, it is the examiner's position that Yazaki shows all of the features of the claimed invention.

For the above reasons, it is believed that the rejections should be sustained.

Application/Control Number: 09/758,978
Art Unit: 3736

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ROBERT L. NASSER
PRIMARY EXAMINER



Respectfully submitted,

Robert L. Nasser

Primary Examiner

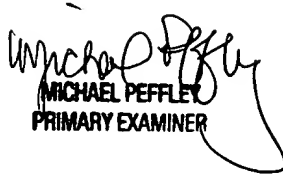
Art Unit 3736

RLN

March 5, 2004

Conferees

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